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LAW REPORTING*

ENGLISH REPORTS.—(*Contd.*)

The importance of English Reports can best be realised by knowing what part English Law has played in moulding the law in India and I shall deal with that aspect of our subject in to-day's lecture.

It is believed that the English Law was introduced into the Presidency Towns by the charters of the various Mayor's Courts. It was a matter of acute controversy in Calcutta, at one time, whether Statutes up to 1726, the date of the earliest charter or those up to 1774, the date of the Regulating Act, were introduced and on this turned the legality of the famous Nanda Kumar conviction. The extent to which English Law was introduced was the subject of discussion in the celebrated case of *Mayor of Lyons* v. *The East India Company*(1) where Lord Brougham indicated his opinion that the native inhabitants were governed by their own laws and that English Law applied only to British subjects and other foreigners who sought the protection of the factories but even in their case good many parts of English Law which from their nature were unsuited to the conditions of the colonies could not be taken to have been so introduced. He accordingly held that the Mortmain Act and the Statute incapacitating aliens from holding land did not apply to Calcutta. So far as the natives of India were concerned, the Supreme Court in the first few years of its existence took the view that the English Law applied to them as well and, in consequence, the Statute of 1781 (21 Geo. III, c. 70, s. 17) prescribed that in all questions of succession and inheritance to all rents and goods and in all matters of contract between party and party

*The twelfth of a series of lectures arranged by the University of Madras delivered by Mr B. Sitarama Rao, Vakil, High Court.

1. (1837) 1 M I A 175.

the Hindus must be governed by Hindu Law, Muhammadans by Muhammadan Law and where parties belonged to different religions the defendant's law should govern the case. This rule was re-enacted in the High Courts Charter Act and finally in S. 112 of the Government of India Act.

So far as the mofussil Courts were concerned Reg. III of 1793 directed that where no specific rule existed, the Courts should decide according to "justice, equity and good conscience". The same rule is repeated in the Bengal Civil Courts Act (XII of 1887).

Similar was the course in Madras and Bombay, but both in Madras and Bombay no attempt seems to have been made at any time to apply the English Law as such to natives of India. For the mofussil Madras Regulation II of 1802 prescribes the same rule as the Bengal Regulation which has been repeated in the Madras Civil Courts Act.

In Bombay, the Bombay Regulation IV of 1827, c. 26 indicated the order of precedence among the various sources of law thus: Statutes, Acts and Regulations, local usage, the law of the defendant, in the absence of any of these, justice, equity and good conscience. Somewhat similar provisions are to be found in the other Civil Court Acts, some placing more emphasis on custom than others. The operation on the one hand of the rule as laid down by Lord Brougham that Statutes and Rules of English Law manifestly inapplicable to Indian conditions should be excluded and on the other of the rule early recognised that the words justice, equity and good conscience meant rules of English Law if found applicable to Indian circumstances [*Varden Seth Sam* v. *Luckpathy Royjee Lallah* (2), *Dada Honaji* v. *Babaji Jagushet* (3) and *Waghela Rajsanji* v. *Shekh Masludin* (4)] and the undesirability of having different rules in the same country one for the mofussil, another for the Presidency Town and one for the natives and another for the Englishmen had the happy result of picking out the universal element from the technical and the accidental in the English Law and evolving a new law called by Phear, J., Indo-English Law better and more equitable in many respects than the English Law. The growth of the Indian law bears resemblance to the growth of the Urdu

2. (1862) 9 M I A 303. 3. (1865) 2 Bom. H. C. R. 36.
4. (1887) I L R 11 Bom. 551 (P C).

language as described by some historians. It was the result of the intercourse between the Muhammadan conquerors with their Arabic and Persian and the native inhabitants with their Hindi. At first broken Hindi on one side and broken Arabic and Persian on the other; out of them gradually evolved a language of considerable beauty and power, the modern Urdu. The administration of English Law was in the commencement of the British Rule mostly in the hands of amateur lawyers who however much regard they might have had for it, had but slight acquaintance with its intricacies and whose familiarity with the usages and the customs of the place was equally slight. In the beginning but bad English Law and equally bad Indian Law, it grew into the present system by a process of natural selection which was all for the best and in this process of the building up of the law the greatest praise is due to the eminent lawyers who sat in the Privy Council and whose judgments are reported in the Moore's Indian Appeals, who were able to rise above the narrow technicality of their law and base their judgments upon the fundamentals of the English Law. It may be partly due to the fact that the Judges were mostly equity lawyers who had no great regard for the refinements of the Common Law.

In *Param Shook Doss* v. *Rasheed Ood Dowlah Bahadoor* (5) it was held that Lord's Day Act was totally unsuited to the conditions of Madras. "The fact that a great majority of the Queen's subjects would be amenable to the general provisions of the Act every Monday morning for not attending the Church under 3 James II. c. 4, for selling goods, working at their ordinary callings, etc., will probably satisfy most minds that such a Statute is manifestly inapplicable". So said Justice Holloway. It was also held that the English Law of process never was the law of the Court, the old charters authorising the Government to make the rules and a rule of the Supreme Court made the practice of the Queen's Bench the law of the Court only so far as the same was applicable. In *Ram Coomar Coon Dos* v. *Chunder Canto Mookerjee* (6) the Privy Council held the rule as to champerty and maintenance to be inapplicable to India for the following reason: "The English statutes on the subject were passed in early times mainly to prohibit high judicial officers and officers of State from oppressing the King's subjects by main-

5. (1874) 7 M H C R 285.
6. (1876) L R 4 I A 23 : I L R 2 C 233 (256) (P C).

taining suits or purchasing rights in litigation. No doubt, by the Common Law also, it was an offence for these and other persons to act in this manner. Before the acquisition of India by the British Crown, these laws, so far as they may be understood to treat as a specific offence the mere purchase of a share of a property in suit in consideration of advances for carrying it on without money had become in a great degree inapplicable to the altered state of society and of property. They were laws of a special character, directed against abuses prevalent, it may be, in England in early times, and had fallen into at least comparative desuetude. Unless, therefore, they were plainly appropriate to the condition of things in the Presidency Towns of India, it ought not to be held that they had been introduced there as specific laws upon the general introduction of British Law.'" They went on to say "the condition of the Presidency Towns, inhabited by various races of people and the legislative provision directing all matters of contract and dealing between party and party to be determined in the case of Muhammadans and Hindus by their own laws and usages or where only one of the parties is a Muhammadan or Hindu by the laws and usages of the defendant furnish reasons for holding that these special laws are inapplicable to the towns." Further on they say "It would be most undesirable that a difference should exist between the law of the towns and the mofussil on this point. Having regard to the frequent dealings between dwellers in the towns and those in the mofussil and between native persons and those in the mofussil and between native persons under different laws it is evident that difficult questions would constantly arise as to which law should govern the case." I have made somewhat copious extracts from the judgment of their Lordships because it contains an exhaustive statement of the considerations that weigh on a question like this. The view taken in this case was followed by the same tribunal in *Raghunath* v. *Nil Kanth* (7) and *Achal Ram* v. *Kasim Husain Khan* (8) and *Bhagwat Dayal Singh* v. *Debi Dayal Sahu* (9). In *Yeap Cheah Neo* v. *Ong Cheng Neo* (10) Sir Montague Smith delivering the judgment of the Judicial Committee of the Privy Council said "whilst English Statutes relating to superstitious uses and to mortmain ought not to be imported into the law of the colony, the rule against perpetuities

7. (1893) I L R 20 C 843 (P C). 8. (1904) I L R 27 A 271.
9. (1908) I L R 35 C 420.
10. (1874) L R 6 P C 381 at p. 394.

was to be considered to be part of it. This rule which certainly has been recognised as existing in the law of England independently of any Statute, is founded upon considerations of public policy, which seem to be applicable to the conditions of such a place as Penang as to England, *viz.*, to prevent mischief of making property inalienable unless for objects which are in some way useful or beneficial to the community. It would obviously be injurious to the interests of the island if convenient for the purposes of trade or for the enlargement of town or a port could be dedicated to a purpose which would for ever prevent such a beneficial use of it. The law of England has however made an exception also on grounds of public policy in favour of gifts for purposes useful and beneficial to the public and which in a wide sense of the term are called charitable uses and this exception may properly be assumed to have passed with the rule into the law of the colony." In *Abdul Kawder* v. *Muhammad Mera* (11) it was held following a case in *Ebrahim Sahib* v. *Nagasami Gurukal* (12), a case from the mofussil which discussed the whole law on the subject, that the English rule that the remedy by a way of a suit for an act which is also a felony is suspended till the defendant is prosecuted for the offence did not apply to the Presidency Town either. In *N. Appa Row* v. *V. Appa Row* (13) the law of attainder was held inapplicable to Indian conditions being feudal in its origin and an incident of the relationship of landlord and tenant and not sovereign and subject. For the same reason, that is to say, that it was a highly technical rule of feudal origin, rule in Shelly's case has been held inapplicable to Parsis in the mofussil. In *The Advocate-General of Bengal* v. *Ranee Surnomoyee Dossee* (14) their Lordships of the Privy Council had to consider the question whether the English rule of forfeiture in the case of suicide or *felo de se* applied to Calcutta. Their Lordships held it did not. Their Lordships held that the English Criminal Law did not apply at all to natives and even if it did, it was subject to necessary limitations and qualifications for instance, non-liability for bigamy or to forfeiture on suicide but they leave the question open as to whether some British subjects may not be subject to the law.

In applying the English law as a rule of equity and good conscience, the caution applied by their Lordships in *Srinath*

11. (1881) I L R 4 M 410. 12. (1881) I L R 3 M 9.
13. (1893) I L R 16 M 384 : 3 M L J 80. 14. (1863) 9 M I A 387.

Roy v. *Dinabandhu Sen* (15) may be repeated here. "In proposing to apply the rules of a distant time or country to the conditions of a particular place at the present day, regard must be had to the physical, social and historical conditions to which that rule is to be adapted." Acting on this rule their Lordships refused to apply certain of the English rules as to waters, diluvion and fisheries. In another case the application of the English rule as to the incapacity of unincorporated bodies like villagers having rights of property of easement or profits *a prendre* is deprecated *Bholanath* v. *Midnapore Zamindary* (16).

The rule of English Law as to forfeiture of tenancy on denial of title has been held to be consistent with justice, equity and good conscience and applied to India [*Maharaja of Jeypore* v. *Rukmini Pattamahdevi Garu* (17)] though the application has not been wholly without protest. In the case of mortgages, with a provision that in default of payment, the transaction should be treated as a sale the Courts in India thought that they were at liberty to apply the English rules of Equity but the Privy Council pointed out that the rules of Equity come in only in the absence of specific rules and, there being customary rules, it was not open to the Courts to innovate by appeal to principles of equity in *Pattabhirama Aiyar's Case* (18). But the delay in passing the judgment made it difficult to go back on the rule laid down by Courts and the Courts have stuck to the new rule with the sanction of the Privy Council itself. *Thambusawmi Moodelly* v. *Hoosain Rowther* (19). In the case of carriers, the Common Law has been applied and the Privy Council held in *The Irrawaddi Flotilla Co.* v. *Bugwandas* (20) that those rules were unaffected by the Contract Act. Again, referring to the statute relating to fraudulent conveyances, their Lordships said in *Abdul Hye* v. *Mir Mohammad Mozaffar Hossain* (21) "Whether or not that Statute 13 Eliz. c. 5 (which may not extend to or operate in the mofussil in India) is more than declaratory of the Common Law so far as it avoids transactions intended to defraud creditors. there seems to be no doubt that its principles and the principles

15. (1914) I L R 42 C 489 : 27 M L J 419 (P C).
16. (1904) I L R 31 Cal. 503.
17. (1918) I L R 42 M 589 at 598 : 36 M L J 543 (P C).
18. (1870) 13 M I A 560.
19. (1875) I L R 1 M 1 (P C). 20. (1891) I L R 18 C 620 (P C)
21. (1883) I L R 10 C 616 at 624 (P C).

of the Common Law for avoiding fraudulent conveyance has been given effect to by the High Courts of India and have properly guided their decisions in administering law according to equity and good conscience."—Lord Fitzgerald. In *Raja Kishendatt Ram* v. *Raja Mumtaz Ali Khan* (22) in applying the rule of English Law as to accretions of certain purchases by a mortgagee to the mortgaged estate, their Lordships of the Privy Council say "If the principle invoked depend on any technical rule of English Law it would of course be inapplicable to a case, determinable like this on broad principles of equity and good conscience. It is only applicable because it is agreeable to general equity and good conscience. And again if it possesses that character, the limits of its applicability are not to be taken as rigidly defined by the course of English decisions although these decisions are undoubtedly valuable in so far as they recognise the general equity of the principle and show how it has been applied by the Courts of this country." Arguing on reasoning analogous to that contained in the qualification made by their Lordships, the Madras High Court was prepared to extend the doctrine of salvage to an extent not recognised by English Law but recognised by the Irish Courts *Rajah of Vizianagaram* v. *Rajah Setucherla Somasekhararaz* (23). In *V. H. Lopez* v. *E. J. Lopez* (24) a Full Bench of the Calcutta High Court while applying the English rules as to marriage to a European (not a British subject) declined to apply the rule as to deceased wife's sister. In *Parvathi* v. *Mannar* (25) the Madras High Court declined to apply the English rule that slander is not actionable except in special cases without proof of special damage on the ground that the distinction made between libel and slander under the English Law is not "founded on natural justice and should not be imported into the law of India". The Calcutta High Court takes a different view in this matter. The English rules as to torts have been generally accepted in this country with the rule of absolute privilege for parties, Counsel, etc. The Courts are divided on the question whether the Common Law can be considered to qualify the Penal Code. A recent instance of recognition of Common Law right is that in a Madras case where the right of arrest by a private man of a disorderly person was upheld. The rules as to construction of Statutes, that is to say, those of the fundamental rules such as

22. (1879) I L R 5 C 198 (P C). 23. (1900) I L R 26 M 686 (F B)
24. (1885) I L R 12 C 706 (F B). 25. (1884) I L R 8 M 175

that that construction should be adopted which gives the best effect to the intention of the party [*Chunnilal Parvati Shankar v. Bai Samrath* (26)] cannot differ according to climate and of course bind equally in England and India.

The way in which English Law has affected the growth of Hindu Law may now be considered. Take, for instance, the judgment of L.J. Knight Bruce in *Soorjemoney Dasee's case* (27) "Whatever may have been formerly considered the state of the law as to the testamentary power of Hindus over their property that however has now long been recognised and must be considered as completely established. This being so, we are to say whether there is anything against public convenience, anything generally mischievous or anything against general principles of law in allowing a testator to give property whether by way of remainder or by way of executory bequest (to borrow terms from the Law of England) upon an event which is to happen if at all immediately on the close of the life in being. Their Lordships think there is not; there would be great general inconvenience and public mischief in denying such power and it is their duty to advise that such power exists." Again, in *Wamanrao Damodar* v. *Rustomji Edalji* (28) where the question was as to whether *powers* should be recognised in Hindu Law their Lordships say The remaining question is whether his power to designate the person (to take) by her will is contrary to any principle of Hindu Law. Their Lordships think that the law as to adoption shows that such a power as that in question is not contrary to any principle of Hindu Law. Further they think that the reasons that have led them to testamentary power becoming a part of the Hindu Law are applicable to this power and it is their duty to hold it to be valid. But whilst saying that, they ought also say that, in their opinion, the English Law of powers is not fit to be applied generally to Hindu wills. In the *Tagore case,* (29) Justice Willes says "whilst however rules of detail, prevailing in England are to be laid aside, there are general principles affecting the transfer of property which must prevail wherever law exists and to which resort must be had in deciding several questions of an elementary character which have been strongly argued in this case and as to which there is no precise authority."

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26. (1914) I L R 38 B 399 : 26 M L J 647 (P C).
27. (1862) 9 M I A 123.
28. (1896) I L R 21 B 702 at 703. 29. (1872) 18 W R 359 at 364.

These rules are said to be:

(1) A man cannot create new form of estate or alter the line of succession.

(2) The rule as to beneficent construction of wills.

(3) Disregard of clauses repugnant to the estate conferred.

(4) The rule that children include those in embryo.

"The law of will has, however, grown up so to speak naturally, from a law which furnishes no analogy but that of gifts and it is the duty of the tribunal dealing with a case new in the instance to be governed by the established principles and the analogies which have heretofore prevailed in like cases. The rule of jurisdiction in new cases was stated by Lord Wensleydale in the opinion delivered by him as a Judge in the House of Lords in *Mirehouse* v. *Rennell* (30) in accordance with principles generally recognised. "This case," said Lord Wensleydale, "is in same sense new, as many others are which continually occur, but we have no right to consider it because it is new as one for which the law has not provided at all; and because it has not yet been decided to decide it for ourselves according to our judgment of what is right and expedient. Our Common Law system consists in applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents and for the sake of attaining uniformity, consistency and certainty we must apply those rules where they are not plainly unreasonable and inconvenient to all cases which arise and we are not at liberty to regret them and to abandon all analogy to them in those to which they have not yet been judicially applied because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to us to be of great importance to keep the principle steadily in view not merely for the determination of that particular case but for the interests of law as a science." Though this may all be good English Law it can hardly be said to recognise the principle laid down in *Bhyah Ram Singh* v. *Bhyah Ugur* Singh (31) "The Hindu Law contains in itself the principles of its own exposition. Nothing from a foreign source should be introduced into it, nor should Courts interpret the text by the application of the language of strained analogies".

Certain rules of English Law have been applied as based on general principles and certain,

30. (1833) 1 Cl. & F 527 at 546. 31. (1870) 13 M I A 373 at 390.

DEPARTMENT OF LAW

others not, as based on artificial rules. The rule that when a grant is made to two people jointly and one of them cannot take, the other will or when a particular estate fails, the ulterior estate takes effect and the rule that a person cannot approbate and reprobate and the principle that no man will be permitted to take advantage of his own wrong have been held as applicable to Hindu Law as to English Law. But it is no new doctrine that "rules established in English Courts for construing English documents are not such as applicable to transactions between natives of this country. Rules of construction are rules designed to assist in ascertaining intention and the applicability of many such rules depend upon the habits of thought and modes of expression prevalent among those to whose language they are applied. English rules of construction have grown up side by side with a very special law of property and a very artificial system of conveyancing and the success of these rules in giving effect to the real intention of those whose language they are used to interpret, depends not more upon their original fitness for that purpose than upon the fact that English documents of a formal kind accordingly framed with the knowledge of the very rules of construction which are afterwards applied to them. It is a very serious thing to use such rules in interpreting the instruments of Hindus who view most transactions from a different point of view, think differently and speak differently from Englishmen and who have never heard of the rules in question" or as put in *Norendra Nath Sarcar* v. *Kamalbasini Dasi* (32) "to construe one will with reference to expressions of more or less doubtful expressions to be found in other wills is for the most part an unprofitable exercise. Happily that method of interpretation has gone out of fashion in this country. To extend it to India would hardly be desirable. To search and sift the heaps of cases which cumber our reports in order to understand and interpret wills of people speaking a different tongue trained in different habits of thought and brought up under different conditions of life seems almost absurd." When asked to uphold an executory bequest which would be valid under the English Law their Lordships said "It would be to apply a very false and mischievous principle if it were held that the nature and extent of the power can be governed by any analogy of the law of England. Our system is one of the most artificial character, founded in a great degree on feudal rules,

32. (1896) I L R 23 C 563 : 6 M L J 71 (P C).

Acc. No.

regulated by Acts of Parliament and adjusted by a long course of judicial decisions to the wants of a state of society differing as far as possible from that which prevails among Hindus in India." Tenancy by entirety and joint tenancy have for this reason been found against by their Lordships of the Privy Council in *Jogeswar Narain Deo* v. *Ramchandra Dutt* (33). The Hindu Law of Religious Trusts are not governed by English law but in the carrying out of them some of the English rules have been adopted by the British Courts.

The combined operation of the rule of exclusion of English Law based upon its unsuitability, the diversity of views upon the subject and the general inefficiency in the legal sense of the judicial officers went to make the Law necessarily very uncertain. To remedy this defect, 3 and 4 Will. IV C. 85, S. 53 provided for the appointment of a law commission with a view to the enacting of laws "that may be applicable in common to all classes of the inhabitants of the said territories, due regard being had to the rights, feelings and usages of the people.". The first commission composed of Macaulay, Macleod, Anderson and Miller met in 1834 and under the instruction of the Local Government prepared a draft Penal Code. The next Charter Act 16 and 17 Vict. c 95 provided for the appointment of a commission in England to examine the recommendation of the first commission. This second commission composed of Sir John Romilly, M. R., Sir John Jervis and Ryan and others prepared a plan of new system of judicature with drafts of the Codes of Criminal and Civil Procedure. They gave it as their opinion that what India wants is a body of substantive civil law in preparing which the law of England should be used as a basis but which once enacted should itself be the law of India on the subjects it embraced." In 1859, the Civil Procedure Code was passed, in 1861 the Criminal Procedure Code and in 1859 Limitation Act. In 1861 a fresh commission was issued for the purpose in the language of the second commissioners of "framing for India a body of substantive law in preparing which the law of England should be used as a basis." The Commissioners were Sir John Romilly, Earle, C. J., Ryan, Lowe, Willes, J., and Macleod. The Commission was repeatedly renewed. The first report contained the draft Succession Act, the second the draft Contract Act, the third a draft Negotiable

33. (1896) I L R 23 C 670 : L R 23 I A 37 : 6 M L J 75.

Instruments Act, the fifth the draft Evidence Act, the sixth a draft Transfer of Property Act and the seventh related to the revision of the Code of Criminal Procedure. In 1865 Succession Act became the law. In 1865 the Council passed a Marriage Act, in 1866 a Companies Act, in 1868 General Clauses Act, in 1869 the Divorce Act. These codes were drawn up by Sir Henry Maine or under his direction. In 1872 the Contract Act and the Evidence Act became law. In 1877 the Specific Relief Act. The Transfer of Property Act was remodelled to such an extent that only five of the old sections remained. Similarly the Negotiable Instruments Act, the Trusts Act and Easements Act were drafted and all the bills were submitted to a commission composed of Turner, C. J., West, J. and Mr. Stokes. This commission also recommended that English Law should be the basis but that its materials should be recast having regard to the native habits. In accordance with the recommendations, with suitable modification, the Negotiable Instruments Act was passed in 1881, Trusts Act, Transfer of Property Act and Easements Act in 1882. Revised editions of the Codes relating to Companies, Civil Procedure and Criminal Procedure also were passed. The Civil Procedure Code, Criminal Procedure Code and the Companies Act have since had considerable recasting. The substance of all these various Acts is based on English law and the terminology is drawn from English law and subject to the limitations, we have expressed when dealing with precedents, English decisions are of great assistance in interpreting these various Acts.

The Succession Act, for instance, is based on English law, the two chief deviations from the English law being first, in abolishing the distinction between devolution of moveable and immoveable property, second, in abolishing husband's right to the wife's property by marriage and all the rules that grow from that circumstance such as tenancy by entirety, tenancy by courtesy and dower. The rule of intestate devolution follows closely the English rule as to moveables except that the wife inherits the property in the absence of the kindred unlike under English rule under which she gets only half. As regards executors, the right of retainer is taken away and the executor is required to pay creditors *pro rata*.

Special kinds of contracts are still governed by the Common Law such as the law relating to Carriers, Charterparties and Shipping generally. The Contract Act has the reputation of being the most ill-drawn Act. It was based on the Draft Civil

Code of New York and was never subjected to patient, penetrating revision by skilled draughtsmen. The Transfer of Property Act also proceeds on the basis of English Law, of course, with certain modifications but in regard to some branches dealt with, for instance, leases, agricultural leases are still governed by the principles of English law except in so far as local usages affect them. On most subjects our Indian Codes being unlike the English Codes, very meagre frequent resort to Enlgish case-law becomes necessary. The Trusts Act abolishes the distinction between equitable estates and legal estates recognised by English law but which the Hindu law at any rate did not recognise but, in other matters, the English law has been closely followed. The Easements Act is in the main based on the law of England which being according to the draughtsman Mr. Stokes, just, equitable and almost free from local peculiarities had, in many cases previous to the Act, been held to regulate the subject in India. The few deviations that have been made are on points not covered by Indian or English Authority and borrowed from modern jurists. So far as the Specific Relief Act is concerned it deviates on a few points from English Law, for the rest, it closely follows the English rules. These points are said to be according to Mr. Stokes: (1) The Act discards the English doctrine that a contract to be specifically enforceable must be enforceable by both. This is doubtful having regard to the pronouncement of the Privy Council as regards the necessity for mutuality in the case of contracts by guardians of minors. (2) The dismissal of a suit for specific performance bars the suit for compensation. In England, Chancery Courts will not enforce performance of a contractual liability extending over many years. The Specific Relief Act renders it more precise by fixing three years. (3) The Act does not recognise the distinctions between the settlement of moveables and immoveables or the husband's rights over the wife's property. (4) It does not deal with the doctrine of part-performance or laches, on the ground that there is no scope for their application. This assumption does not seem to be right and under the recent rulings of the Privy Council, the doctrine has still operation in India. The Companies Act and the Insolvency Acts like other Acts dealing with commercial contracts follow closely on the lines of English Law and in many cases the Act being drawn almost *ipsissima verba* as the English Acts, the authority of the English cases becomes great. On this the following observa-

tions of Sir Montague Smith dealing with the construction of a Colonial Statute are valuable : "Their Lordships think that the Court in the colony might well have taken this decision as an authoritative construction of the Statute. It is the judgment of the Court of Appeal by which all the Courts in England are bound until a contrary determination has been arrived at by the House of Lords. Their Lordships think that in the colonies when a like enactment has been passed by the legislature the colonial courts should also govern themselves by it. When the English and the Colonial Law is different, the English case-law is not binding on them."

SUMMARY OF ENGLISH CASES.

ACHILLI *v.* TOVELL, (1927) 2 K B 243.

Injunction—Restrictive covenant not to build—Breach by assignee having notice—Mandatory injunction—Discretion of court to award damages in lieu of injunction.

Where there was a restrictive covenant not to build on the adjacent land so as to obstruct or interfere with the light and air to the windows on the plaintiff's cottage and the assignees of the adjacent land having full notice of the covenant chose to erect a wall so as to restrict the light and air to the windows belonging to the plaintiff

Held, that the plaintiff was entitled to a mandatory order to pull down so much of the defendant's wall as materially interfered with the access of light and air enjoyed by the plaintiff. In such a case the court had no jurisdiction or discretion to force the plaintiff to accept damages in lieu of an injunction.

REX *v.* MINISTER OF TRANSPORT. *Ex parte* H. C. MOTOR WORKS, LTD., (1927) 2 K B 401.

Local Government—Licence to run omnibuses—Failure of applicants to give undertaking to charge minimum fare—Refusal of licence—Appeal to Minister of Transport—Considerations of public policy—Certiorari *and* Mandamus.

A Municipal corporation refused to grant licences to run omnibuses because the applicants refused to give an undertaking that they would charge certain minimum fares upon their omnibuses which were running along the route upon which trams were running. There was an appeal by the applicants to the Minister of Transport who after holding an enquiry thought fit not to pass any order. It appeared that the Minister

considered it essential in the public interest that some arrangement should be made to discourage the use of omnibuses for the carriage of short distance passengers on that portion of the route served by the tramway system and that in refusing to grant licences he was guided by the question of minimum fares to be charged by the applicants. On two applications being taken against the Minister one for a writ of *certiorari* and another for *mandamus*

Held, that the Minister had acted properly under the circumstances of the case and that the applications were unsustainable.

SUGAR SUPPLY COMMISSION *v.* HARTLEPOOLS SEATONIA STEAMSHIP CO., (1927) 2 K B 419 : 96 L J K B 959.

Shipping—Charterparty—Conclusive evidence clause—Bill of lading—Statement as to quantity not conclusive—Which to prevail—Shortage of goods—No proof of error or fraud—Liability of shipowners.

A charterparty contained the following clause :—" Quantity stated on bills of lading to be conclusive evidence as to number of bags shipped unless fraud or error can be proved." It was provided by a caluse in the body of the bill of lading "that the carrier shall not be concluded as to the correctness of statements herein of .... quantity". A parcel of goods was tendered to the ship and the mate signed a receipt for certain quantity and on that basis the master signed the bill of lading. When the ship arrived at the port of destination the cargo was tallied on discharge and a smaller quantity of goods was found. In an action by the charterers against the shipowners for the value of the shortage

Held, that the conclusive evidence clause in the charterparty was in no way modified by the bill of lading and that the shipowners not having proved any error or fraud were liable in damages for the value of the shortage.

GOSSE MILLARD *v.* CANADIAN GOVERNMENT MERCHANT MARINE, (1927) 2 K. B. 432.

Shipping—Bill of lading—Delivery of goods in damaged condition—Negligence—Onus of proof.

The carrier's failure to deliver the goods in the same apparent order and condition as on shipment constitutes a *primâ facie* breach of his obligations, casting on him the *onus* to excuse that breach. The preliminary *onus* is not on the

owner of the goods to give affirmative evidence that the carrier has been negligent. It is enough if the owner of the goods proves either that the goods have not been delivered or have been delivered damaged. The carrier is a bailee and it is for him to show that he has taken reasonable care of goods while they have been in his custody. So if the cause of the damage to the goods has not been ascertained but is left in doubt the carrier has not discharged the *onus* which is on him to negative negligence and hence he must be held liable.

ANGLISS & CO., (AUSTRALIA) PROPRIETARY *v.* PENINSULAR AND ORIENTAL STEAM NAVIGATION CO., (1927) 2 K. B. 456.

Shipping—Bill of lading—Duty to exercise due diligence—Default of ship-builder—Ship rendered defective—Damage to goods—Liability of shipowner.

S. 5 of the Australian Sea Carriage of Goods Act, 1924 provides as follows:—"There shall not be implied in any contract for the carriage of goods by sea to which this Act applies any absolute undertaking by the carrier of the goods to provide a seaworthy ship." Art. 3, R. 1 provides that "the carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to make the ship seaworthy...... and make the holds and other parts of the ship fit and safe for the reception, carriage and preservation.."

The plaintiffs shipped on board the defendants' steamship in Australia some carcases of lamb in apparent good order for delivery at London. The provisions of the Australian Act, 1924 were embodied in the bill of lading. On arrival it was found that one-half of the goods were damaged by oil taint. It was found that the design of the bar and its fitting was inadequate and defective but that these involved no failure of due diligence on the part of any person concerned. It was also found that there was some bad workmanship both in riveting and in fitting the bar to the bulkhead which was entirely the fault of the workmen employed by the builders and could not have been detected by any reasonable care on the part of the defendants. In an action by the plaintiffs claiming damages for alleged breach of contract or breach of duty by the defendants.

Held, by Wright, J., that though the defendants would be liable for the lack of due diligence on the part of their servants, they were not liable for the default of the shipbuilders and

their workmen if they had entrusted the construction work to builders of repute and that consequently the action should be dismissed.

Development of Maritime Law traced.

MIDLAND BANK, LTD. *v.* INLAND REVENUE COMMISSIONERS, (1927) 2 K. B. 465.

Bills of Exchange—Bank issuing receipt forms to customers—Payments made at sight or on demand—Instruments amounting to bills—Liability to stamp duty —Stamp Act, 1891.

Where a bank issued to their customers booklets containing receipt forms somewhat similar in appearance to cheques and authorised them to sign the same and obtain small payments from the bank and the receipts were made payable to the drawer or endorsee on demand or at sight

Held, that the instruments were bills of exchange within the meaning of the Stamp Act, 1891 and that they were chargeable with stamp duty.

REX *v.* ESSEX JUSTICES. *Ex parte* PERKINS, (1927) 2 K. B. 475.

Criminal Law—Clerk of justices found to have acted as solicitor for party in connected matter—Order of justices if vitiated—Certiorari.

A solicitor's clerk was consulted by a lady with regard to a deed of separation between herself and her husband. Subsequently a summons for maintenance was heard by the justices at the instance of the wife and the solicitor acted as the clerk of the justices. An order having been passed in favour of the wife the husband applied for a writ of *certiorari* on the ground that the justices' clerk having acted as solicitor for one of the parties took part in the hearing. It appeared that the solicitor was not aware that he had acted for the lady.

Held, that the solicitor was unfit to act as clerk and the writ of *certiorari* must be issued. The question was not whether any injustice was in fact caused to the applicant but whether there was reasonable impression in his mind that justice was not being done. *Held also* that the applicant not having been fully cognizant of his right to take objection to the clerk to the justices acting as such he could not be said to have waived that right by failure to exercise it.

(1924) 1 K. B. 256 applied.

DALE *v.* MITCALFE, (1927) 2 K. B. 491.

Income-tax—Settlement—Accumulations for benefit of person on contingency—Settlement conferring only life-estate—Refund of tax paid—Income-tax Act, 1918, *S.* 25.

S. 25 of the Income-tax Act, 1918 provides as follows:—"Where in pursuance of the provisions of any will or settlement any income arising from any fund is accumulated for the benefit of any person contingently on his attaining some specified age or marrying, and the aggregate amount in any year of assessment..... is of such an amount only as would entitle an individual to total exemption from tax the person shall on making a claim...... be entitled to have repaid to him on account of the tax paid".

A settlement provided that the income of certain money was to be accumulated contingently upon a lady reaching twenty-one or marrying. The accumulations were to be capitalized, if they had not been used under the powers of the settlement, and with the capital were to form a fund of which she was to have the interest during her life. The lady on attaining the age of twenty-one years claimed for refund of tax paid.

Held, that the income was accumlated for her benefit: though she got only a life-estate under the settlement and that the tax paid should be refunded to her.

WILLIAMS *v.* SANDERS, (1927) 2 K. B. 498: 96 L. J. K. B. 912.

Income-tax—Assessment of landlord in respect of house or building—Actual rents paid by tenants as the basis—Income-tax Act, 1918, *Sch. A, No. VII, R.* 8 (*c*).

No. VII, R. 8 (*c*) of the rules of Sch. A to the Income-tax Act, 1918 provides that the assessment and charge shall be made upon the landlord in respect of any house or any building let in different apartments or tenements and occupied by two or more persons as one entire house or tenement.

Held, that the total weekly rents paid by the tenants for the year constitute the annual value for purposes of assessment and not the hypothetical rent that a middleman will pay for the entire tenement.

MACKENZIE-KENNEDY *v.* AIR COUNCIL, (1927) 2 K B 517 (C. A.)

Crown—Air Council—Action for tort against—Maintainability.

Held, that the Air Council is a Department of State and that an action for tort is not maintainable against that body.

PATRICK *v.* RUSSO-BRITISH GRAIN EXPORT COMPANY, LTD., (1927) 2 K. B. 535.

Sale of goods—Breach of contract—Re-sale contemplated—Damages—Loss of profits on re-sale recoverable.

The sellers sold to the buyers a certain quantity of Russian wheat at a certain price delivery to be made at a certain date. It appeared that it was in the contemplation of both parties that the wheat would probably be re-sold by the buyers who were merchants and as a matter of fact the buyers soon after re-sold the goods at a slightly increased rate. Subsequently the sellers informed the buyers that it was impossible for them to perform the contract and no delivery was ever made. It was found that on and after the date of the breach by the sellers it was impossible to obtain Russian wheat in the market. In an action by the buyers for damages, *held,* that the loss of profit on re-sale was recoverable.

Per Salter, J.—"It is not necessary, in order to entitle the buyer to recover loss of profit on re-sale, that the seller should have known, when he sold, that the buyer was buying to implement a contract already made, or that the buyer would *certainly* re-sell ; it is enough if both parties contemplate that the buyer will *probably* re-sell and the seller is content to take the risk."

MESSAGER *v.* BRITISH BROADCASTING CO., (1927) 2 K. B 543.

Copyright—License to perform opera in theatres—Assignability—Broadcasting as infringing copyright—Damages—Copyright Act, 1911, *S.* 1.

The plaintiff gave *E,* a well-known theatrical producer. certain rights in a comic opera called "*The Little Michus*". The agreement while conferring on *E* the exclusive right of performing the play in certain countries reserved the copyright for the plaintiff. Throughout the document the words "licensors" and

"licensee" were expressly used and no mention was made of the executors or assigns of *E*. After *E's* death his representatives licenced the defendants to perform the play by broadcasting it. A broadcasting performance was given in the defendants' private studio and although the public were not admitted thereto the performance was rendered audible to the public by means of electrical instruments. In an action by the plaintiff claiming damages for infringement of copyright

Held, by McCardie, J. (1) that the defendants gave a performance "in public" within the meaning of S. 1 of the Copyright Act, 1911 and that there was an infringement of copyright; (2) that the agreement gave rise merely to a license of a limited character enabling the licensee to perform the opera at theatres and that a wireless performance was not contemplated; (3) that the license resting as it did on personal considerations of skill and confidence terminated with the death of the licensee and was therefore not assignable; (4) that the plaintiff was entitled to damages on the basis of the injury actually caused to his performing rights.

REX *v.* DORA HARRIS, (1927) 2 K. B. 587.

Criminal Law—Witness—Judge when may call after close of defence.

The presiding Judge at a criminal trial has the right to call a witness not called by either the prosecution or the defence, and without the consent of either the prosecution or the defence, if in his opinion such a course is necessary in the interests of justice. But the Judge ought not to exercise the right affter the close of the defence unless some matter arises *ex improviso,* which no human ingenuity can foresee and which can be answered by contrary evidence on the part of the Crown.

Reg v. *Frost,* 9 C & P 129 applied.

CLARK *v.* WESTAWAY, (1927) 2 K. B. 597.

Criminal Law—Illegal betting—Conviction under Betting Act, 1853*—Subsequent conviction under Finance Act,* 1926, *for same offence—Legality—*Autrefois convict.

Where the accused who carried on business as a bookmaker without a certificate was convicted and sentenced under S. 3 of the Betting Act, 1853 and subsequently he was once again convicted under S. 17 of the Finance Act, 1926 for the same offence

Held, that there being nothing in the later enactment to exempt persons already convicted under other statutes there was no room for a plea of *autrefois convict* and that therefore the second conviction was sustainable in law.

Saunders v. *Baldy*, L. R. 1 Q. B. 87, relied on.

In re LANYON ; LANYON *v.* LANYON, (1927) 2 Ch. 264.

Will—Construction—Partial restraint of marriage—"Blood relation" who is—Defeasance clause to operate on marriage of legatee with blood relation—Validity.

A testator directed that his trustees should stand possessed of his residuary estate upon trust to pay the income to his son the defendant for his life, and on his decease upon trust, to pay the capital to his child or children and equally between them if more than one "provided he (the defendant) does not marry a relation by blood....... And in the event of my son not leaving a child or children surviving him who shall live to attain the age of twenty-one years, or in the event of his marrying a blood relation" then upon certain other trusts. The testator having died the trustees took out a summons to have it determined who were "blood relations" and what were the consequences of the defendant marrying a blood relation.

Held, by Russell, J. (1) that the word "blood relation" does not mean statutory next of kin but a person who stands in lawful descent from a common ancestor; (2) that although the clause in the will relating to marriage gives rise merely to a partial restraint of marriage it is void because it is impossible to ascertain definitely that a particular lady is not a blood relation; (3) that the effect of the defeasance clause assuming it to be valid in law will be to defeat the interests of children of the defendant and not to defeat his life interest.

In re WILLIAMS, PUBLIC TRUSTEE *v.* WILLIAMS, (1927) 2 Ch. 283.

Charity—Bequest for assisting education of candidates for Holy Orders in Church of England-Whether amounts to a charitable gift—Provision for alteration of objects of trust—Effect.

The testator, a clerk in Holy Orders, conveyed his estate to the Public Trustee and directed that it should be constituted a fund and the income should be utilised by a named Board of

Trustees for assisting the education of candidates for Holy Orders in the Church of England. By a subsequent clause he provided as follows : "If for any sufficient reason. . . . the trustees decide that the interests of the church would be better served by any changes in the method of administering or even in the object to which the fund is applied such changes may be made . . . ."

Held, that the will contained a valid charitable gift and that the same was not rendered void by reason of the power conferred on the trustees to alter the object to which the fund was applied.

Nature of charitable gifts discussed by Clauson, J.

In re : FORDER, FORDER *v.* FORDER, (1927) 2 Ch. 291 (C. A.)

Will—Construction—Forfeiture clause to take effect on bankruptcy—Bankruptcy and subsequent annulment—Moneys available for payment during interval—Forfeiture to take effect.

A will contained a forfeiture clause to the effect that the legatee's interest should be forfeited on his becoming bankrupt. *E* who acquired an interest under the will became bankrupt but the bankruptcy was subsequently annulled. Between the date of adjudication and the date of annulment there were in the hands of the trustees moneys available for payment to the beneficiary but payment was not in fact made.

Held, by the Court of Appeal reversing a judgment of Clauson, J., that the forfeiture clause took effect and that the subsequent annulment did not have the effect of rendering it inoperative. The latest date for the annulment of bankruptcy to be effective would be a date just prior to the time when there was some payment of income that could be rightly made and rightly received.

In re, DAVIS'S TRADE MARKS. DAVIS *v.* SUSSEX RUBBER CO., LTD., (1927) 2 Ch. 345 (C A).

Trade Mark—Word 'Ustikon' registered and used as trade mark—Evidence showing same to be distinctive—Word also descriptive—Effect—Use of word 'Justickon by rival trader—Infringement of trade mark—Trade Marks Acts, 1905 *and* 1919.

The plaintiff, a manufacturer of rubber soles, had got the word 'Ustikon' registered as his trade mark. After he had

carried on business using the said mark for some time, in the course of which he made substantial sales, the defendant adopted the word 'Justickon' for use in connection with their manufacture of similar goods. In an action by the plaintiff to restrain the alleged infringement of his trade-mark it was contended on behalf of the defendants that the word 'Ustikon' was merely a misspelt combination of the words "you stick on" and was not distinctive of the plaintiff's goods. It appeared from the evidence that the name used by the plaintiff was in fact adopted and used to distinguish his goods.

Held, by the Court of Appeal affirming a decision of Russell J., that the mere fact that the word 'Ustikon' was descriptive of the goods did not render its registration as distinctive of the plaintiff's goods invalid in law, and that the use of the word 'Justickon' was liable to mislead and was therefore an infringement of the plaintiff's trade mark.

In re A DEBTOR, (1927) 2 Ch. 367 (C A).

Contract—Loan—Secret commission paid by lender to borrower's agent—Effect—Debt whether can be the basis of receiving order in bankruptcy.

A secret commission paid to the borrower's agent by the lender without the borrower's knowledge is corrupt under the Prevention of Corruption Act, 1906, so as to render the contract voidable at the instance of the borrower and the debt cannot form the basis of a receiving order in bankruptcy.

JOTTINGS AND CUTTINGS.

"Punch's" Legal Advice.—Rarely indeed can one convict *Punch* of legal error; its staff of learned clerks appears to be very well versed and grounded in legal principles. Even a law lord may make a mistake, and no harm done; but *Punch* is different; its legal reputation, like the honour of a lady or a Prime Minister will bear no partial diminution. And when it is about to offer legal advice it would be wise if it followed one of its own famous precedents, and didn't.

"Mens Conscia Legis ; or, Every Man his own Lawyer,' considers the position which may arise in consequence of the fact that some legal knowledge is now required for admission to sundry trades and other occupations; it foresees in verse an ever-lengthening queue of lean-faced lawyers waiting for the dole; and it advises women thus:

"For women too must learn the lawyer's jargon.
Oh, tackle contracts in your early teens !
'Twill be no use looking pretty if you haven't studied *Chitty*
And don't know what "reversionary" means;
So dig your comely noses into *Stephens*,
Or soon you'll be out-distanced in the race;
However well you play an' sing, read up the New Conveyancing,
And understand the 'Rule in Shelley's Case.'"

—*The Law Journal*, November 12, 1927, p. 347.

Don't.—Now if the "tinker, tailor, soldier or sailor" who wrote that unlicensed verse had not mentioned the new conveyancing in the penultimate, we could have forgiven him for the last line. Whether or not "the Rule in Shelley's Case" is "the same as the Rule in any other case, for the law is no respecter of persons" as an examinee once wrote is no longer matter; for the Rule itself was abolished by section 131 of the "new conveyancing" Act, the Law of Property Act, 1925.

It is too bad that the dear girls consuming so much of their youth in hard reading for the qualifying commercial examination, should have this unnecessary task thrust upon them. Later, if they want to indulge in legal excavations; but not now. And who is Stephens?

—*The Law Journal*, November 12, 1927, p. 347.

Definitions.—Every practitioner knows, and appreciates, the reluctance of His Majesty's Judges to venture upon anything like an exhaustive definition of any word or phrase left by the legislature undefined. Those mysterious experts whose duty it is to catch the meaning of the Government and crystallise the same in some form of apparently intelligible words are prone to leave as much as possible to judicial erudition and imagination. One cannot blame them. Nor can one blame the Judges for their shyness; or for confining their interpretation "solely to the facts before them."

"Insane" and "drunk" are notorious examples of the undefined. The law relating to trade unions has furnished many; and the latest Act will supply many more. When the Judges are "up against it," they do their best within the limits of each succeeding case. So Roche, J., has recently in part defined "Employment in Agriculture" within the meaning of

the Unemployment Insurance Acts; in the case before him it was essential to do so to that extent; and because it was not really necessary, the Court of Criminal Appeal, failing the early authorities, has refused to explain the legal meaning of a "newly born child" within section 1 (2) of the Infanticide Act, 1922. The Court saw a simpler way out; and they took it with a firm tread.

—*The Law Journal*, November 12, 1927, p. 347.

The Value of Free Legal Advice.—When, a few days ago in the Chancery Division a witness informed Eve, J., that the parties had sought the advice of a weekly journal, that eminent Judge observed that free legal advice was generally very poor stuff. It is a demonstrable fact that Eve, J., did not refer to the *Law Journal* in this general observation; but as a generalisation his statement is undoubtedly true. It is credibly stated that an eminent Judge has at various times delivered himself to a friend *ex tempore* of opinions of no legal value; and eminent counsel have not been guiltless in this respect. "That opinion," said Sargant, L. J., of one given by a barrister to a friend for nothing, "was worth just what was paid for it."

Yet must we not forget the good opinions delivered freely or frequently by counsel for Poor Persons. I have seen such opinions prove their worth in action; and have seen a Poor Person after a long day's trial, go home with a good judgment for a thousand pounds, while the poor barrister returned fee-less to his chambers.

—*The Law Journal, November 12, 1927*, p. 348.

Asleep on the Bench.—A "Law Officer" has recently written of Judges who had the habit of appearing to slumber on the Bench. He observes that this judicial sleep, like Stevenson's death, is apparent only; it would be unwise to proceed on that assumption. "The presumed sleep is simply thought; the Judge has closed his eyes; he wishes to obliterate everything around him, as if in prayer." All very well; and I can bear testimony to the fact that some Judges, like the late Bray, J., were very wide awake during this seeming somnolence.

On the other hand, there have been Judges who have slept indeed. What of Coleridge, L. C. J., as sound a sleeper as ever sat upon the Bench? When asked how his friend Coleridge was, Mathew, L. J., was able to assure the anxious

enquirer that the Chief Justice had "quite recovered from his insomnia". "It is true that Lord Chief Justice Coleridge was also present"—words used in the Court of Appeal by Upjohn, K. C.—were not spoken of a Judge awake.

—*The Law Journal,* November 12, 1927, p. 348.

Lord Birkenhead's Lost Patent.—In calling aloud the name, titles and additions of Lord Birkenhead at the Abercorn Rooms the other day, the toast master made a regrettable but not a calamitous mistake in referring to his Lordship as a K. C. Lord Birkenhead observed, in putting the matter right, that if he desired again to practise at the Bar, it would be necessary to approach his old friend the Lord Chancellor and obtain from him a fresh patent as King's Counsel. There are instances of a Master returning to practise at the Bar; and very remote precedents of Judges who, on being removed from the Bench, have sadly returned to practise. There is no precedent in modern times for such a return by a Lord Chancellor; and it may be assumed that Lord Birkenhead, save only in circumstances so extreme and remote as to be unthinkable, will not return to the Bar; although he has apparently considered how it should be done.

—*The Law Journal,* November 19, 1927, p. 368.

Lord Hewart on Insanity and Crime.—Lord Hewart's lecture, which we report on another page, delivered before the Medical Society of London last week, if it is not exactly an irenicon to the doctors, yet puts with absolute clearness the points of difference as to the legal and medical views of insanity and crime. In effect it was a repudiation of the plea of uncontrollable impulse advocated by the British Medical Association before Lord Justice Atkin's Committee of 1922-23 on the Criminal Responsibility of the Insane—the Committee was appointed in consequence of the outcry raised by the reprieve of Ronald True—and adopted unanimously by that Committee. We need not go back to the rival view advanced before the Committee by the Medico-Psychological Association. That body would have abrogated the Rules in *Macnaughten's Case* (1843, 10 Cl. & F 200) altogether, and substituted an inquiry, based on medical evidence: (1) was the prisoner insane; (2) if so, was the crime nevertheless unrelated to his mental disorder? That appears to represent the

extreme medical view. The British Medical Association were more conservative. They adopted the test in *Macnaughten's Case*—was the accused labouring at the time under such a defect of reason as (1) not to know the nature and quality of the act he was doing, and, (2) if he did know it, then not to know that he was doing wrong? But they added a third test: Was he prevented by mental disease from controlling his own conduct? If so, he was not to be responsible when the absence of the power of control was the direct and immediate consequence of his own default. Lord Justice Atkin's Committee accepted this further test, saying: "It was established to our satisfaction that there are cases of mental disorder where the impulse to do a criminal act recurs with increasing force until it is in fact uncontrollable." And they added: "The suggested rule postulates mental disease; and we think that it should be made clear that the law does recognise irresponsibility on the ground of insanity where the act was committed under an impulse which the prisoner was, by mental disease, in substance deprived of any power to resist".

—*The Law Journal,* November 26, 1927.

Uncontrollable impulse.—This is the view which the Lord Chief Justice combats, fortified, perhaps, by the knowledge that it is opposed to the law as now administered—though not, without hints of judicial dissent—in the Courts over which he presides, and which cannot be altered save by Act of Parliament. He recapitulates the tests we have shortly summarised above. To establish a defence on the ground of insanity there must be proved: (1) disease of the mind; (2) consequential defect of reason; (3) resulting in either (*a*) ignorance of what he was doing, or (*b*) ignorance that it was wrong. Lord Hewart's objection to the new test suggested by the British Medical Association is that, if adopted, it would abolish both branches of test (3) in his statement. If uncontrollable impulse is admitted and is proved, ignorance of the nature of the action and ignorance that it was wrong are alike immaterial. It is enough that by mental disease the accused had no power to resist. And his objection, we gather, lies in this: that while tests (3) (*a*) and (*b*) are proper and sufficient in the great majority of cases, the new test, even if found as a fact, would apply in too few cases to make an alteration of the law expedient. With this alteration, the practical tests now applied would be replaced by a general

inquiry as to irresistible impulse. We doubt whether the opposite school—represented, we may perhaps say, by Lord Justice Atkin—would admit this. The present tests would remain for ordinary cases; the plea of uncontrollable impulse due to mental disease would be available if appropriate. In Lord Hewart's view, the same end is already attained by a verdict of "guilty but insane". He was one of the opponents of Lord Darling's abortive Bill of 1924 to give effect to the Report of the Committee, and at present that Report has made no headway. But the controversy cannot be considered as closed. The Rule in *Macnaughten's Case*, it may be observed, have no binding force in themselves. They only rank as *obiter*. Their force springs from their adoption by the Courts.

—*The Law Journal*, November, p. 370 26, 1927.

A Knightly Thrust.—Passages of arms between Bench and Bar, on those occasions when such regrettable incidents occur, are rarely so witty or so pleasant as that which happened some years ago between Darling, J., who, shortly before had been made a Privy Councillor, and Sir Albion Richardson, an "utter" barrister upon whom the honour of knighthood had about the same time been conferred.

Darling, J., in a case in which Sir Albion appeared, continued to address him as Mr. Richardson, until at last the Associate stood up and whispered a correction in the Judge's ear, whereupon the Rt. Honourable Mr. Justice Darling thus spoke: "You see, Sir Albion, things have altered very greatly since my young days at the Bar. Then it was not usual to confer knighthoods on junior barristers, but only on law officers and others of the highest eminence". "And your lordship will also recollect," replied Sir Albion, "that in your young days at the Bar it was not customary to make puisne Judges Privy Councillors." Darling, J., accepted this retort with due acknowledgement—"a knightly thrust."

—*The Law Journal*, November, 26, 1927, p. 392.

Humour off the Bench.—When all is said, the absence from the King's Bench of anyone with any pretensions to the title of judicial humorist is a loss to be deplored. Surely, in our day, there must be some eligible candidate, one who combines in his own person the qualities of a sound lawyer with judicial gifts and a controlled sense of humour? Not one who

will jest in season and out of season, but who will on fitting occasions illumine what is so dark and dismal in the dreary courses of the Law. Court IV, with all respect, is admittedly not what it was; better perhaps, but certainly duller since Darling J., retired. There are discerning people who did not approve of all the interjections of that famous Judge; but they candidly admit the merit of the remainder. There must be someone at the Bar who possesses the sovereign gifts of wit and legal wisdom, and who might carry on the great tradition of those eminent Judges who could make a timely jest. Chancery, is better off than Common Law at this moment; but a laugh in Chancery, though pleasing, is not at home; it sounds therein like an ecclesiastical offence.

—*The Law Journal*, Dec. 3, 1927, p. 413.

McCardie, J., on Case Law.—There was an obvious appropriateness in the subject—"Case Law"—selected by Mr. Justice McCardie for his lecture at University College, London, on Wednesday, for the learned lecturer's own judgments show that he is a master of his subject as few judges have been. But really the subject was larger than the title indicates. The modern rule of precedents emerged towards the end, but Mr. Justice McCardie's object was rather to impress on his hearers the historical and social value of the mass of judicial decisions which began with the Year Books. The binding nature of decisions is, in his view, of comparatively recent origin. "Probably it was not until the latter part of the 19th century that our present doctrine of strict adherence to prior decision was fully established." It may be so, though we imagine current belief would put it much earlier. But case law is the vehicle by which the Common Law has been developed, and, apart from the social life which the early reports, like no other records, reveal, in the Common Law—to use Mr. Justice McCardie's words—"are to be found in conspicuous degree those elements of history, of broadening freedom, of commercial expansion, and of practical wisdom which give life and fascination to the whole range of English Law." His welcome quotations from Lord Bowen's address to the Birmingham Law Students' Society in 1884 recall a Judge who is remembered with peculiar warmth of feeling by the older generation of lawyers. Bowen's judgments, as in the *Maxim-Nordenfelt Case* and the *Mogul Case*, were masterpieces of judicial reasoning, but

he himself was greater than his judgments. But we cannot follow Mr. Justice McCardie through his lecture. From the Year Books, which, as he cites from Pollock and Maitland "should be our glory, for no other country has anything like them," he comes down to modern times, and his complaint of our system of case law—so far as he has a complaint—is that it tends to become too crystallised. Is the Common Law still capable of growth? We touched on the subject last week in referring to Lord Hewart's after-dinner speech on the Law Merchant. The matter, as Mr. Justice McCardie says, lies with the higher tribunals. "Unless appellate tribunals admit the principle of growth and change, little can be done by Judges of first instance". That is the problem which always confronts the Judge who thinks he sees his way to a useful broadening of an old rule while it is being applied to new facts. We note with interest Mr. Justice McCardie's reference to Mr. Allen's recent work, "Law in the Making,' a remarkable and very valuable addition to a subject which, as the writings of J. C. Gray, Salmond, and Prof. Holdsworth show, has aroused great interest in recent times.

—*The Law Journal*, Dec. 10, 1927, p. 419.

Costs of Litigation.—During the course of the Lords' debate on the Landlord and Tenant Bill, Lord Buckmaster again drew attention to the prevailing high costs of litigation, and observed that, in the disputes contemplated by the Bill, the fees of expert witnesses and the necessary costs of counsel might be such as to rob victory of its spoils. He did not suggest a remedy; and Lord Sumner took the gloomy view that costs, like the poor, are always with us, and he did not know how the evil could be cured, except by the abolition of litigation. There can be no doubt that the increased costs of litigation have resulted in great injury not only to litigants, but to members of the legal profession. Yet two observations may be made as to the items of costs referred to by Lord Buckmaster. The magnitude of experts' fees is a matter outside the control of those who are responsible for the administration of justice. The fees paid to Counsel are largely determined by the litigants themselves. Competent Counsel are available for fees which are certainly not excessive as compared with those charged by members of other professions; and if a client insists on the services of what are called

"fashionable" counsel, that is matter for the exercise of his own discretion. In the press comment which has appeared on the subject, it is generally assumed that Counsel's fees are the main item in a bill of costs. As a general rule, they make up a comparatively small percentage of the bill. On the other hand, Court-fees have greatly increased, and it may well be asked whether the administration of justice should be made a source of public revenue. It is also well known that costs are often greatly augmented by unpenalised interlocutory applications of a frivolous character. The time is certainly ripe for authoritative investigation and inquiry into the whole subject.

—*The Law Journal,* Dec. 17, 1927, p. 449.

BOOK REVIEWS.

THE PROVINCIAL INSOLVENCY AAT, by A. C. Ghose, M.A., B.L., Vakil, High Court, Calcutta. Published by M. C. Sarkar & Sons. Price Rs. 5.

This is a most useful commentary on an enactment of almost daily use. Almost every provision of the Act has come up for consideration before the Courts and the case-law has grown so much in volume that notwithstanding the best efforts of the author, he has not found it possible to compress the size of his work any further. One feature of the work that we should draw particular attention to is that the author has not merely given reference to the cases, but has, when necessary, given his own opinion upon them. His frank expressions of opinion are sure to provoke thought and take the work out of the category of the mere digest type of publications. The appendices give the rules framed by the various High Courts under the Provincial Insolvency Act. We would, however, suggest that the English Bankruptcy Act on which the Insolvency Acts in this country are largely based may be given as an appendix as many of the leading decisions in this branch of law are given by the highest Courts in England and they cannot be correctly understood without reference to the enactments on which they are based. We have no doubt that the volume under review will be found useful to all those having to do with this branch of the law.

THE PRESIDENCY TOWNS AND PROVINCIAL INSOLVENCY ACTS: A Comparative Study, by Ranjitlal H. Pandia, *Bar-at-Law*, Bombay. Price Rs. 2-8-0.

A comparative study of the Presidency and Provincial Towns Insolvency Acts is necessary as they differ in many particulars and unless they are kept in view one is apt to take the decisions given under the one enactment as applicable to the other, overlooking the difference. The author has given the sections of both the Acts in juxtaposition, so that the reader may compare them and note the points of difference between them. The notes deal with both the enactments giving reference to the decided cases wherever necessary. Though the work is mainly intended for students it will also be found useful by the beginners in the profession. The rules framed by the High Courts have been incorporated in the body of the commentary at their proper places to enable the reader to obtain a comprehensive view of the subject. The first twenty-one chapters of the work give a clear view of the law on the subject with reference to the sections of the Act in the author's own words in the natural order of the subjects dealt with.

MADRAS ACTS, CRIMINAL, PART II.

We are glad to acknowledge the receipt of the Madras Acts (Criminal), by P. Hari Rao, B.A., B.L., High Court Vakil, Madras, published by T. A. Venkasawmi Rao, Law Book-seller and Publisher, Mount Road, Madras.

CURRENT INDIAN STATUTES, 1927.

We are glad to acknowledge the receipt of the Current Indian Statutes for the year 1927 published by the Manager, Lahore Law Times, containing the Acts of the Supreme Council with commentary, important Notifications by the Government of India and Statutes concerning British India by the Imperial Parliament.